Supreme Court, U.S.
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No. 94-1514

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE GILMORE MARTIN
and JULIA S. MARTIN,

Petitioners,

v.

BANK OF FLOYD, a Virginia banking corporation; GENTRY, LOCKE, RAKES & MOORE, a partnership; WILLIAM R. RAKES, individually; WILLIAM J. CREECH, JR., individually; G. HARRIS WARNER, JR., individually; and RONALD LEON MOORE, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, a Georgia forum, lacked personal jurisdiction over the defendant Virginia attorneys when their only contacts with Georgia were (1) sending the petitioners, who had moved from Virginia to Georgia, a notice of foreclosure on collateralized Virginia property in connection with the petitioners' default on a loan obtained by the petitioners, when they were Virginia residents, from a Virginia bank and (2) serving the petitioners with a summons in connection with the subsequent deficiency action brought by the attorneys on behalf of the Virginia bank.

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OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is unreported, but is reprinted in the Petition for Writ of Certiorari on pages 25-28. The Eleventh Circuit Court of Appeals' denial of the petitioners' Petition for Rehearing is also unreported, but is reprinted in the Petition for Writ of Certiorari on page 39. The Order of the United States District Court for the Northern District of Georgia is also unreported, but is reprinted in the Petition for Writ of Certiorari on pages 29-38.

GROUNDS FOR JURISDICTION

Jurisdiction to consider the Petition exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are relevant and are set forth in the Appendices: U.S. Const. Amend. V; 18 U.S.C. § 1965(b); O.C.G.A. § 9-10-91; and O.C.G.A. § 9-10-94.

STATEMENT OF THE CASE

1. Procedural Facts

On May 5, 1993, the petitioners George Gilmore Martin and Julia S. Martin filed this action in the United States District Court for the Northern District of Georgia against William R. Rakes ("Mr. Rakes"), William J. Creech, Jr. ("Mr. Creech"); G. Harris Warner, Jr. ("Mr. Warner") (referred to collectively as "the attorneys"); Gentry, Locke, Rakes & Moore ("the law firm"); Ronald Leon Moore ("Mr. Moore"); and Bank of Floyd ("the bank"). (R1-1-1.) All defendants filed motions to dismiss

on the grounds that the complaint failed to state a claim upon which relief could be granted and that the court lacked personal jurisdiction over them. (R1-7-1.) Judge Marvin H. Shoob, in an order dated March 1, 1994 and entered March 3, 1994, granted their motions to dismiss on the grounds that the Northern District of Georgia lacked personal jurisdiction over them. (R1-16-1, R1-17-1.)

The Court of Appeals for the Eleventh Circuit affirmed the district court's order and then denied the petitioners' motion for rehearing. The petitioners have now filed in this Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

2. Statement of Facts

Gentry, Locke, Rakes & Moore is a prominent and reputable Virginia law firm with offices in Roanoke, Virginia. (R1-7-Affidavit of William J. Creech, Jr., ¶ 6.) The law firm has no employees who reside in Georgia, does not regularly transact business or practice law in the state of Georgia, is not licensed to transact business in the state of Georgia, and has no agents in Georgia. (R1-7-Creech Aff., ¶ 6.)

Mr. Rakes,[1] Mr. Creech, and Mr. Warner were at all times pertinent to this action members of this law firm. At no time material to this case have any of these attorneys practiced law in Georgia, been licensed to practice law in Georgia, resided in Georgia, or maintained any office or place of business of any kind in Georgia. (R1-7-Creech Aff., ¶¶ 3-4, 8-9.) The attorneys' and their law firm's first contact with the petitioners occurred when the Bank of Floyd, a Virginia bank with its principal office in Floyd County, Virginia, retained the attorneys and their law firm to act as trustees in connection with the Bank's

[1]At the time the lawsuit was filed, Mr. Rakes was serving as the President of the Virginia State Bar.

foreclosure on certain secured property owned by the petitioners. (R1-5-Affidavit of Ronald Leon Moore, ¶5; R1-7-Creech Aff., ¶ 12.)

The petitioners, while residents of Virginia, had executed a $630,000 promissory note to the Bank of Floyd and, to secure this loan, executed a deed of trust in favor of the Bank contemporaneous with the loan. (R1-1-3,4.) Both the promissory note and the deed of trust were executed in the Commonwealth of Virginia while the petitioners were residents of Virginia. (R1-5-Moore Aff., ¶ 7; R1-7-Creech Aff., ¶ 11.)

The petitioners defaulted on this loan and moved to Georgia, and the Bank of Floyd instituted foreclosure proceedings on the property securing the loan. (R1-7-Creech Aff., ¶ 12.) William J. Creech was appointed as a substitute trustee under the deed of trust, an appointment which was expressly allowed by the terms of the deed of trust. (R1-1-8,50.) As required by Virginia law, Mr. Creech, in his position as substitute trustee, sent a letter to the petitioners on November 19, 1991 advising them that their note was in default, that the amount due under the note had been accelerated, and that the Bank of Floyd intended to foreclose on its security interest in the property under the deed of trust. (R1-7-Creech Aff., ¶ 13, Ex. B.) In further compliance with Virginia law governing foreclosure proceedings, the subject property was advertised for sale in a local Virginia newspaper. (R1-1-21,22,69.)

On December 4, 1991, Mr. Creech, acting pursuant to his powers as trustee under the deed of trust, sold the subject real property at public auction. (R. 1-1-23.) At this auction, the Bank of Floyd submitted bids on all but one of the lots comprising the subject property. (R1-1-23.) The Bank's bids, although higher than the bids of all others, were for an amount less than the outstanding unpaid balance on the petitioners' promissory note obligation. (R1-1-23.) Following the auction, Mr. Creech, acting as trustee under the deed of trust, transferred this property to

the Bank on December 16, 1991. (R1-1-23.) Mr. Creech, as compensation for his services as trustee, charged the Bank of Floyd a commission of $7,500. (R1-1-23.)

Although the Bank of Floyd purchased the subject property at an auction, the auction did not sufficiently cover the petitioners' obligation under the promissory note. (R1-1-25.) In an attempt to collect the remainder of the money that the petitioners' owed the Bank of Floyd, the Bank of Floyd retained the attorneys and their law firm to sue the petitioners for the deficiency amount. (R1-1-24.) As required by Virginia law, the petitioners were served with the summons in Georgia by the Secretary of the Commonwealth of Virginia. (R1-1-24,27.)

Despite the pending Virginia deficiency action, which afforded the petitioners an opportunity to bring each of the claims alleged in their complaint, the petitioners filed this complaint in the Northern District of Georgia on May 5, 1993. (R1-1-1.) Nonetheless, the petitioners continued to defend themselves in the Virginia deficiency action, which was tried on October 15, 1993 and resulted in a judgment in favor of the Bank of Floyd for damages in the sum of $170,183.27 and for attorneys' fees in the amount of $42,545.82.[2] The petitioners then appealed this decision to the Virginia Supreme Court, and on April 5, 1994 the Virginia Supreme Court dismissed their appeal.[3]

These facts, which describe a standard foreclosure proceeding and subsequent deficiency action, are undisputed. Although the petitioners do not dispute these facts, they have, by asserting numerous conclusory and unsupported allegations

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[2]As this decision is unpublished, the order entered on December 9, 1993 by the Circuit Court for the County of Roanoke is reprinted as Exhibit A to this brief. This judgment was entered before the district court issued its order dismissing the attorneys and their law firm, but it is not part of the district court's record in this case.

[3]As this decision is unpublished, the Virginia Supreme Court's decision dismissing the appeal is reprinted as Exhibit B to this brief. This decision by

of fraud and conspiracy, attempted to allege that the attorneys and their law firm violated Federal RICO statutes, violated Georgia RICO statutes, breached fiduciary duties, and conspired to breach fiduciary duties. (R1-1-1, 45.) In fact, the petitioners have, in their Petition, described this valid foreclosure and subsequent deficiency action as "criminal". (Petition at 1.) The attorneys and their law firm vigorously dispute any insinuation of impropriety in their handling of the Virginia foreclosure and the Virginia deficiency action.

SUMMARY OF THE ARGUMENT

The decision of the United States Court of Appeals for the Eleventh Circuit was correct, and this case meets none of the criteria of Supreme Court Rule 10.1 for granting a writ of certiorari. There are simply no "special and important reasons" for this Court to duplicate the Eleventh Circuit's review of the record and application of the well-established law of personal jurisdiction to the particular facts of this case.

The Eleventh Circuit was correct in holding that the district court lacked personal jurisdiction over the individual attorneys and their law firm. Due process mandates that before a court can exercise jurisdiction over a defendant, the defendant must have constitutionally-sufficient contacts with the forum and also be amenable to service of process. In this case, the individual attorneys and their law firm do not meet either of these requirements.

In order to have a constitutionally-sufficient relationship with the forum, a defendant must purposefully establish minimum contacts with the forum, and the forum's exercise of personal jurisdiction over the defendant must comport with traditional notions of fair play and substantial justice. In this

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the Supreme Court of Virginia was issued one month after the district court's order dismissing the attorneys and their law firm in this case. As such, it was not a part of the district court's record in this case.

case, the individual attorneys and their law firm did not have minimum contacts with Georgia because they have not purposefully availed themselves of the protections and benefits of Georgia law. Their only reason for having any association with Georgia was that the petitioners defaulted on a loan and moved to Georgia, thus requiring the attorneys and their law firm to provide them with notice in Georgia of the pending Virginia foreclosure and subsequent Virginia deficiency action. Thus, the individual attorneys and their law firm did not purposefully avail themselves of the protection of Georgia law.

Likewise, traditional notions of fair play and substantial justice dictate that the individual attorneys and their law firm are not subject to personal jurisdiction in Georgia. The petitioners had every opportunity and every motivation to litigate these allegations in the Virginia deficiency action. The petitioners, having already had one opportunity to contest the validity of the foreclosure and of the deficiency action, should not be allowed to relitigate these allegations in Georgia.

Even if the individual attorneys and their law firm have established constitutionally-sufficient contacts with Georgia, they are not subject to personal jurisdiction because they are not amenable to service of process. Neither the RICO service of process statute nor the Georgia long-arm statute authorizes service of process on them. The RICO service of process statute, which allows nationwide service of process, only applies if one defendant is subject to personal jurisdiction in the forum and if no other forum exists where all defendants are subject to personal jurisdiction. It is inapplicable in this case because none of the defendants are subject to personal jurisdiction in Georgia and because all are subject to personal jurisdiction in Virginia. Finally, the Georgia long-arm statute does not authorize service of process in this case because the individual attorneys and their law firm have not engaged in any of the

acts specified by that statute as conferring jurisdiction to a Georgia court over a non-resident defendant.

The attorneys and their law firm are not subject to personal jurisdiction in Georgia because they do not have constitutionally-sufficient contacts with Georgia and are not amenable to service of process. Thus, this Court should deny the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. The Law Governing Personal Jurisdiction Is Well-Settled, and the Eleventh Circuit's Decision Does Not Alter These Established Principles.

The Due Process Clause of the fifth amendment to the United States Constitution provides that "[no] person shall be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. V. In a long line of cases, this Court has interpreted this provision as prohibiting a federal court from exercising power over a defendant unless the court possesses personal jurisdiction over that defendant. *See, e.g, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinne*, 456 U.S. 694, 702 (1982); *International Shoe v. Washington*, 326 U.S. 310, 316 (1945). "The personal jurisdiction requirement recognizes and protects an individual liberty interest [and] represents a restriction on judicial power . . . as a matter of individual liberty." *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (quoting *Insurance Corp. of Ireland*, 456 U.S. at 702).

This Court has long employed a two-prong test for determining whether a court's exercise of jurisdiction over a defendant complies with the Due Process Clause:

(1) the defendant must possess a constitutionally-sufficient relationship with the forum; and

(2) the defendant must be amenable to service of summons.[4]

Omni Capital Int'l, 484 U.S. at 104; *see also, Delong Equipment Co. v. Washington Mills*, 840 F.2d 843 (11th Cir. 1988) In the case at bar, as the Eleventh Circuit properly recognized, the petitioners have failed to establish the existence of either prong.

II. The Individual Attorneys and Their Law Firm Do Not Have a Constitutionally-Sufficient Relationship with Georgia.

This Court has established a two-part test for determining whether a defendant has a constitutionally-sufficient relationship with the forum:

(1) the defendant must purposefully establish sufficient "minimum contacts" with the forum; and

(2) the forum's exercise of personal jurisdiction over the defendant must comport with "traditional notions of fair play and substantial justice."

International Shoe 326 U.S. 310 (1945). This test, which determines the "constitutionality sufficient relationship" prong of the personal jurisdiction test, is well-established and in no dispute. In this case, as the Eleventh Circuit held, the petitioners have failed to establish either part of the *International Shoe* test for determining whether a constitutionally-sufficient relationship exists between the lawyers and the State of Georgia.

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[4] This Court has employed the same test regardless of whether the personal jurisdiction requirement flowed from the fifth amendment, *Omni Capital Int'l*, 484 U.S. at 103-104 (applying test to personal jurisdiction in federal court), or from the fourteenth amendment, *International Shoe*, 326 U.S. 310, 316 (1949) (applying test to personal jurisdiction in state court). Thus, cases such as *International Shoe*, which were decided under the fourteenth amendment, "provide guidance in determining whether due process is satisfied here." *In re Chase & Osborn Corp.*, 835 F.2d 1341, 1345 (11th Cir. 1988) *rev'd on other grounds sub nom. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

A. The Attorneys Have Not Established Minimum Contacts with Georgia Because They Have Not Purposefully Availed Themselves of the Privilege of Conducting Activities Within the State of Georgia.

"[U]nilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state." *Woodson World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (quoting *Hanson v. Denckla*, 357 U.S. 235,253 (1958)). Rather, the touchstone of "minimum contacts" is "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King v. Rudzewicz*, 471 U.S. 462 (1985)(quoting *Hanson*, 357 U.S. at 253)).

The primary basis for the Eleventh Circuit's decision was that the attorneys and their law firm in the case at bar have in no way purposefully availed themselves of the benefits and protections of Georgia law. The Eleventh Circuit noted that the attorneys' contacts with Georgia were merely incidental to their purposeful attempt to avail themselves of the protections of the laws of the Commonwealth of Virginia. (Decision of the Eleventh Circuit, reprinted at p. 29of Petition for Certiorari.) After the petitioners defaulted on a loan they had obtained from the Bank of Floyd, Mr. Creech, a resident of Virginia, acted as trustee during the Bank's subsequent foreclosure and sale of the petitioners' Virginia property securing the loan. (R1-7-Creech Aff.,¶ 12.) The sale of these properties failed to satisfy the petitioners' debt to the Bank, and the Bank then retained the attorneys and their law firm to represent it in an action brought in Roanoke, Virginia against the petitioners to recover this deficiency. (R1-7-Creech Aff., ¶ 12;R1-5-Moore Aff., ¶ 6.) All of these activities occurred in Virginia; none took place in Georgia.

The only contacts that any of the attorneys had with Georgia were to mail a letter to the petitioners advising them that their note was in default and to employ Virginia's service of process procedure to bring a deficiency action against the petitioners in Virginia. (R. 1-1-32;R. 1-7-Creech Aff., ¶ 13.) Those two communications, both of which were required by Virginia law, represent the totality of the attorneys' contacts with the state of Georgia. Further,the only reason that the attorneys had this slight contact with Georgia was because of the unilateral decision by the petitioners to move to Georgia.

This Court has consistently refused to allow "the unilateral activity of those who claim some relationship with a nonresident defendant [to] satisfy the requirement of contact with the forum State." *Kulko v. Superior Court of California*, 436 U.S. 84 (1978) (quoting *Hanson*, 357 U.S. at 253)). In this case, the unilateral act of the petitioners moving to Georgia provided the sole reason for any contact by the attorneys with Georgia. As such, this Court's long line of cases holding that the unilateral act of one party cannot create the requisite minimum contacts prohibited the trial court from exercising personal jurisdiction over the defendants. *See, e.g., Kulko*, 436 U.S. at 94-95 (holding that New York resident had not purposefully availed himself of the benefits of California law when his children and former wife moved to California and instituted a child support action against him there); *Woodson*, 444 U.S. at 297-98 (holding that New York automobile retailer and distributor did not purposefully avail themselves of the benefits of Oklahoma law simply because they sold a car to a customer who had an accident after driving the car to Oklahoma).

The petitioners in the case at bar, like the mother and children in *Kulko* and the automobile purchaser in *Woodson*, are attempting to drag a non-resident defendant into the forum of their choice based solely upon their unilateral conduct. The petitioners, not the attorneys and their law firm, chose to move to

Georgia. Further, the individual attorneys and their law firm, like the father in *Kulko* and the retailer and wholesaler in *Woodson*, have absolutely no contacts with the forum state except for that prompted by the unilateral conduct of the petitioners.

The attorneys, all Virginia residents, simply represented a Virginia bank (1) in the foreclosure of Virginia property owned by the petitioners, Virginia residents who had defaulted on their loan and moved to Georgia, and (2) in a subsequent deficiency action brought in Virginia against the petitioners. The attorneys and their law firm, by representing Virginia clients in a Virginia foreclosure and in a Virginia lawsuit, have done nothing to avail themselves of the protection of Georgia law. Thus, they are not subject to the jurisdiction of the United States District Court for the Northern District of Georgia.

B. Even If the Attorneys and Their Law Firm Have Established Minimum Contacts with Georgia, Traditional Notions of Fair Play and Substantial Justice Prohibit the District Court from Exercising Personal Jurisdiction over Them.

The second prong of the *International Shoe* test requires that the exercise of personal jurisdiction over a defendant must "comport with `fair play and substantial justice.'" *Burger King*, 471 U.S. at 476 (quoting *International Shoe*, 326 U.S. at 320)). This Court has listed five factors that should guide a court's determination of whether the exercise of personal jurisdiction"comports with `fair play and substantial justice:'"

(1) the burden on the defendant,
(2) the forum's interest in adjudicating the dispute,
(3) the plaintiffs' interest in obtaining convenient and effective relief,
(4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and
(5) the shared interest of the several States in furthering fundamental substantive social policies.

Asahi Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1986). These factors all weigh heavily against the exercise of personal jurisdiction in Georgia over the individual attorneys and their law firm.

First, the burden on the individual attorneys and their law firm in defending this action in Georgia is great. The law firm and the individual attorneys are Virginia residents. All witnesses, except the petitioners, reside in Virginia. (R. 1-7-Creech Aff., ¶ 10.) All events in the allegedly conspiratorial foreclosure occurred in Virginia. No activity occurred in Georgia. Forcing these defendants, a Virginia law firm and three Virginia attorneys, to defend this action in Georgia solely because the petitioners unilaterally chose to move to Georgia runs counter to the notions of fair play and substantial justice.

Second, Georgia has no interest in adjudicating this dispute. All allegedly wrongful acts occurred in Virginia among Virginia residents relating to Virginia property. Virginia law governed the deficiency action and all aspects of the petitioners' dealings with the Bank of Floyd, including their execution of the promissory note and deed of trust as well as the foreclosure and subsequent sale of their property securing the defaulted loan. Georgia substantive law has no application to any aspect of this case. (R. 1-7-Creech Aff., ¶ 11.) Thus, Georgia has no interest in adjudicating this action.

The third factor, the petitioners' interest in obtaining convenient and effective relief, also weighs heavily in favor of the attorneys because the petitioners have already had an opportunity to obtain the very relief sought in this action. The allegations contained in the petitioners' complaint represent nothing more than an attack on the validity of both the foreclosure and the subsequent deficiency action. As such, the petitioners had every opportunity *and every motivation* to litigate these allegations in the Virginia deficiency action, either as counterclaims or as defenses.

The fourth factor, obtaining the most efficient resolution of controversies, also militates against the exercise of personal jurisdiction over the attorneys and their law firm. The most efficient resolution of this controversy will occur if the Virginia deficiency action serves as the final resolution for these claims. The petitioners, having lost the Virginia deficiency action, nevertheless continue in this appeal to pursue an entirely different action in the Northern District of Georgia based upon the exact same set of facts as was the Virginia deficiency action. Thus, the petitioners cannot claim that jurisdiction over the attorneys and their law firm promotes "the most efficient resolution of controversies." *Woodson*, 444 U.S. at 292.

Finally, the last factor, the interest of the "several States in furthering fundamental substantive social policies," *id.*, is not furthered by the exercise of jurisdiction in Georgia. Virginia's protection of persons from fraud or conspiracy, if proved, is no less than Georgia's. Thus, there is no "potential clash of the forum's law with the fundamental substantive social policies of another state." *Burger King*, 471 U.S. at 477.

Each of the five *Asahi* factors supports the district court's conclusion that it did not possess personal jurisdiction over the attorneys and their law firm. "Traditional notions of fair play and substantial justice" do not require the individual attorneys and their law firm to relitigate the Virginia deficiency action in the Northern District of Georgia. *See id.* at 477-78. Thus, the Eleventh Circuit was correct in affirming the district court's decision dismissing the attorneys and their law firm for lack of personal jurisdiction.

III. Even If the Attorneys and Their Law Firm Have a Constitutionally-Sufficient Relationship with Georgia, They Are Not Subject to Personal Jurisdiction in This Case Because They Are Not Amenable to Service of Process.

Even if a defendant has a constitutionally-sufficient relationship with the forum, a court still cannot exercise personal

jurisdiction over the defendant unless there is "a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant." *Omni Capital Int'l*, 484 U.S. at 104; *see also, Brink's Mat Ltd. v. Diamond*, 906 F.2d 1519, 1521 (11th Cir. 1990). Thus, even if the individual attorneys and their law firm have a constitutionally-sufficient relationship with Georgia, they are not subject to personal jurisdiction in Georgia unless "there is authorization to serve summons in this litigation." *Omni Capital Int'l*, 484 U.S. at 104.

Federal Rule of Civil Procedure 4(e) governs service of process on an out-of-state defendant in a federal civil case. *Delong Equipment Co.*, 840 F.2d at 847. This rule provides that service of process is appropriate under either a federal statute containing a service of process provision or under the long-arm statute of the state in which the district court sits. *Id.*

Applying this rule to the case at bar, the district court could only exercise jurisdiction over the attorneys and their law firm if either the RICO service of process provision, 18 U.S.C. § 1965(b), or the Georgia long-arm statute, O.C.G.A. § 9-10-91 *et seq*, authorizes service of process on them. Neither provision, however, authorizes service of process in this case.

A. The RICO Service of Process Provision Is Inapplicable to This Case Because None of the Defendants Are Subject to Jurisdiction in Georgia and Because All of the Defendants Are Subject to Personal Jurisdiction in the United States District Court for the Western District of Virginia.

The RICO service of process provision authorizes service of process upon RICO defendants "residing in any other district" if "it is shown that the ends of justice require [it]." 18 U.S.C. § 1965(b). Although this provision provides for nationwide service of process, it is not without limits:

> For nationwide service of process to be imposed under § 1965(b), the court must have personal jurisdiction over at least one of the participants in the alleged multi-district conspiracy and the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators.

Butcher's Union Local No. 498 v. SDC Investment, 788 F.2d 535, 539 (9th Cir. 1986) Thus, a plaintiff cannot choose the forum in which to litigate a RICO action by merely filing a complaint in the district of his choice. "Merely naming persons in a RICO complaint does not, in itself, make them subject to § 1965(b) nationwide service provisions." *Id; LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 826 (N.D. Cal. 1992).

In this case, the petitioners cannot rely upon § 1965(b) because neither requirement is met.[5] The Northern District of Georgia does not have personal jurisdiction over *any* of the defendants, and another district exists that would have personal jurisdiction over *all* of the defendants. As discussed in Section II of this brief, the Northern District of Georgia does not have personal jurisdiction over *any* of the defendants in this action because none have constitutionally-sufficient contacts with Georgia. In this case, the petitioners could have brought this action in Virginia, where all of the defendants are subject to personal jurisdiction. The petitioners, therefore, are prohibited from using the RICO service of process provision to create jurisdiction over these defendants in Georgia.[6]

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[5]Aside from considerations about when the RICO service of process provision applies, another more simple reason exists as to why the plaintiffs cannot use this provision in this case — their complaint fails to state a RICO claim.

[6]Moreover, the nationwide service of process statute is not immune from constitutional scrutiny. For the reasons elaborated earlier in this brief, any exercise of personal jurisdiction in Georgia over these defendants in the factual context of this case and pursuant to that statute would offend against *all* of the most basic principles of due process.

B. The Georgia Long-Arm Statute Does Not Authorize Service of Process Over the Individual Attorneys or Their Law Firm.

The Georgia long-arm statute, O.C.G.A. § 9-10-91 *et seq.*, authorizes service of process on a non-resident who is "subject to the jurisdiction of the courts of the state under Code Section 9-10-91." O.C.G.A. § 9-10-94 . The individual attorneys and their law firm, however, are not subject to jurisdiction under O.C.G.A. § 9-10-91 because they do not meet the specific requirements set forth in this statute.

The petitioners cannot avail themselves of the Georgia long-arm statute merely by demonstrating that the attorneys and their law firm somehow established constitutionally-sufficient contacts with Georgia. "In Georgia, a due process analysis is appropriate only after it is first established that the non-resident defendant committed one of the acts described in the Long Arm Statute." *Simplex-Rapid di Boschiero v. Italia Assicurazioni*, 209 Ga. App. 121, 121, 433 S.E.2d 309, 310 (1993) (quoting *McDonnell v. Roy E. Beatty & Assocs.*, 203 Ga. App. 807, 808-09, 418 S.E.2d 95, 96 (1992)); *accord Showa Denko K.K. v. Pangle*, 202 Ga. App. 245, 247, 414 S.E.2d 658, 660 (1991) (analyzing the long-arm statute separately from due process considerations). These recent cases from the Georgia Court of Appeals indicate that jurisdiction under the Georgia long-arm statute is not conterminous with due process.[7]

[7]The attorneys and their law firm acknowledge that the Eleventh Circuit has previously held "that the Georgia long-arm statute is to be interpreted to the maximum limits of due process." *Delong Equipment Co.*, 840 F.2d at 849 n.7. The holding in *Delong*, however, was made prior to the decisions of the Georgia Court of Appeals cited above. Accordingly, the attorneys and their law firm invite this Court to recognize, as did Judge Murphy of the Northern District of Georgia, that "the elements of federal due process, i.e., minimum contacts and traditional notions of fair play and substantial justice, do not subsume the [long-arm] statute and make it superfluous, instead, they help focus the analysis after one of the five statutory requirements has been met." *Howell v. Komori America Corp.*, 816 F. Supp. 1547, 1552 (N.E. Ga. 1993).

The petitioners in this case must, therefore, establish that the attorneys and their law firm are subject to jurisdiction under the specific requirements of O.C.G.A. § 9-10-91. Absent this showing, the plaintiffs cannot succeed even if the attorneys and their law firm have established constitutionally-sufficient contacts with Georgia.

The Georgia long-arm statute allows Georgia courts to exercise jurisdiction over a non-resident in five circumstances, only two of which, subparagraphs (2) and (3), are relevant to tort cases. O.C.G.A. § 9-10-91(2), while applicable to tort cases, does not apply to this case. It allows jurisdiction over a non-resident if the non-resident "commits a tortious act or omission within this state . . . ." O.C.G.A. § 9-10-91 (2). This provision does not apply in situations where the alleged tortious acts were committed outside of Georgia and caused injury in Georgia. *Gust v. Flint*, 257 Ga. 129, 130, 356 S.E.2d 513, 514 (1987) (holding provision inapplicable when non-resident negotiated by mail and telephone with Georgia residents and allegedly defrauded the Georgia residents in the transaction). It does not, therefore, provide petitioners with a valid basis for service of process on the attorneys.

Likewise, the individual attorneys and their law firm are not subject to personal jurisdiction in Georgia under § 9-10-91(3) of the Georgia long-arm statute. This statute authorizes personal jurisdiction over a non-resident who

> "commits a tortious injury in this state caused by an act or omission outside the state ***if*** the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or service rendered in this state."

O.C.G.A. § 9-10-91(3) (emphasis added). Neither the individual attorneys nor their law firm regularly transacts business or practices law in the State of Georgia, is licensed to transact business in the State of Georgia, or has an agent in the State of Georgia. (R1-7-Creech Aff., ¶¶ 3-9.)

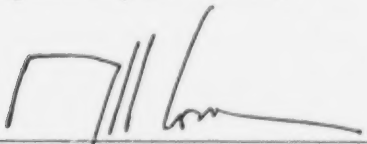
In fact, the only contact with Georgia by any of the attorneys or their law firm was the foreclosure notice and service of process mailed to the petitioners. Thus, neither the individual attorneys nor their law firm have maintained the degree of systematic contacts contemplated by O.C.G.A. § 9-10-91(3). *See McKin v. Gilbert*, 208 Ga. App. 788, 791, 432 S.E.2d 233, 235-36 (1993).

No provision of the Georgia long-arm statute authorizes service of process over the individual attorneys or their law firm. The individual attorneys and their law firm simply are not amenable to service of process in Georgia. The Eleventh Circuit, therefore, was correct in holding that the district court lacks personal jurisdiction over the individual attorneys and their law firm.

CONCLUSION

For the reasons set forth above, this case meets none of the criteria for granting writs of certiorari. There are no "special and important reasons" for this Court to duplicate the task of reviewing the record in this case and applying the established law of personal jurisdiction to this record merely to reach the same conclusions as the Eleventh Circuit. The individual attorneys and their law firm are not subject to personal jurisdiction in Georgia because they have not established constitutionally-sufficient contacts with Georgia and are not amenable to service of process. Accordingly, this Court should deny the petitioner's request for a writ of certiorari.

Respectfully submitted,



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APPENDIX "A"

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "B"

18 U.S.C. § 1965 - Venue and Process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court his held without approval given by a judge of such court upon a showing of good cause.

(d) All other processes in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

APPENDIX "C"

O.C.G.A. § 9-10-91 - Grounds for exercise of personal jurisdiction over nonresident.

A court of this state may exercise personal jurisdiction over any nonresident of his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(4) Owns, uses, or possesses any real property situated within this state; or

(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

O.C.G.A. § .9-10-94 - Service

A person subject to the jurisdiction of the courts of the state under Code Section 9-10-91, or his executor or administrator, may be served with a summons outside the state in the same manner as service is made within the state by any person authorized to make service by the laws of the state, territory, possession, or country in which service is made or by any duly qualified attorney, solicitor, barrister, or the equivalent in such jurisdiction.

EXHIBIT "A"

IN THE CIRCUIT COURT
FOR THE COUNTY OF ROANOKE

THE BANK OF FLOYD,	:	
	:	
Plaintiff.	:	
	:	
v.	:	JUDGMENT ORDER
	:	
GEORGE GILMORE MARTIN	:	CL 92-95
and	:	
JULIA S. MARTIN,	:	
	:	
Defendants.	:	

On Friday, October 15, 1993, came the plaintiff, The Bank of Floyd, by its president, R. Leon Moore, and by counsel, and came the defendants, George Gilmore Martin and Julia S. Martin, in person, neither of them being represented by counsel; and after preliminary motions ruled upon the Trial Court as reflected in the stenographic transcript of evidence, and duly objected and excepted to by the defendants, the issue was joined. Thereupon, came a jury summoned in the manner prescribed by law, from which the defendants challenged for cause, Charles Daniel Cox, III and he was replaced by Fred William Davis. Thereafter counsel for the plaintiff and the defendants in persons exercised their peremptory strikes, leaving the following as the jury for the trial of this action to wit: Shirley Millner, John Hatcher, Gary Dogan, Randall Hill, Charles Hofer, Donita Peverall and Martha Webb, who were sworn to truly try the issue joined, and thereupon the plaintiff, after opening statements, opened with its evidence and rested.

Whereupon, the defendants moved the Court to strike the plaintiff's evidence and for summary judgment in favor of the defendants, which was overruled by the Court and the defendants duly objected to for reasons set forth in oral argument and reflected in the stenographic transcript of evidence and other incidents of trial.

Thereafter, the defendants presented their evidence and rested. Whereupon, the plaintiff moved the Court to strike the defendants' evidence, and for entry of summary judgment in favor of the plaintiff. The motion for the plaintiff was sustained, by reason that only one witness, Leon Moore, the president of The Bank of Floyd, was the only witness called by both the plaintiff and defendants and his testimony being uncontradicted, there was no issue of fact for the jury to decide to which said ruling the defendants duly objected and excepted.

Thereupon, the jury was discharged by the Court and the defendants moved the Court for time for additional motions which permission the Court denied and to which the defendants duly objected and excepted.

It is therefore ADJUDGED and ORDERED that the plaintiff does have and recover of the defendants, as principal and interest through Friday, October 15, 1993, the sum of $170,183.27 and attorneys fees in the amount of $42,545.82.

And the Clerk of this Court shall forthwith certify a copy of this Order to all counsel of record.

All matters having been accomplished, this matter shall be stricken from the docket of this Court and place among the ended files.

ENTERED this 9th day of December, 1993.

/s/ _____

Judge

I request entry of this Order:

/s/ _____
Alton B. Prillaman, Esquire
Jolly, Place, Fralin & Prillaman, P.C.
3912 Electric Rd., S.W.
Roanoke, VA 24018
(703) 989-0000

We have seen this Order and object to its entry:

/s/ _____
George Gilmore Martin, pro se
6210 Aberdeen Drive
Atlanta, GA 30328
(404) 303-8618

/s/ _____
Julia S. Martin, pro se
6210 Aberdeen Drive
Atlanta, GA 30328
(404) 303-8618

Pursuant to Rule 1:13 and pursuant to the telephone conference with the Court on December 6, 1993 at 1:45 p.m., endorsement by the Defendants, George Gilmore Martin and Julia S. Martin, pro se, is hereby dispensed with. From the conference call, the Defendants' objections and exceptions to the entry of this Order with reference to 25% attorney's fees are duly noted by the Court as well as their objections and exceptions to this Final Order.

EXHIBIT "B"

CERTIFICATE

I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that attached hereto is a true copy of the order entered on April 5, 1994 by this Court in the case of *George Gilmore Martin, et al* v. *The Bank of Floyd*, Record NO. 940278

Given under my hand and seal of said Court this 15th day of June, 1994.

/s/ _____
Clerk, Supreme Court of Virginia

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the 5th day of* April, 1994.

George Gilmore Martin, et al., *Appellants,*
against Record No. 940278
Circuit Court No. CL92000095
The Bank of Floyd, *Appellee.*
From the Circuit Court of Roanoke County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk
By: /s/
Deputy Clerk